No. 15889

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE DEUTSCH COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151 *et seq.*), for enforcement of its order issued against The Deutsch Company, herein called respondent, on September 14, 1957 (R. 81-85).[1] The Board's decision

[1] "R" references are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant provisions of the Act appear in the Appendix, *infra, pp.* 34-39.

and order (R. 29-85) are reported at 118 NLRB 1294.[2] This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Los Angeles County, California, where respondent is admittedly engaged in the manufacture for interstate commerce of aircraft parts and components and of screw machine products (R. 31; 8, 13).

STATEMENT OF THE CASE

The Board's order here rests upon its finding that respondent, in violation of Section 8 (a) (1) and (5) of the Act, refused to bargain with the Union[3] duly certified by the Board as the representative of employees of respondent in a single two-plant unit found by the Board to be appropriate. Denying the charge that it unlawfully refused to bargain, respondent has asserted as its principal defenses: (1) that the Board abused its discretion in finding a single two-plant unit, rather than separate plant units, to be appropriate; (2) that the election proceedings conducted by the Board were tainted with irregularity; (3) that a private election conducted at one of the plants subsequent to respondent's refusal to bargain in the unit certified by the Board showed

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[2] The Board denied respondent's petition for rehearing on November 7, 1957 (R. 103-104).

[3] The certification ran to United Industrial Workers Local 976, UAW, AFL-CIO (R. 33; 342-343). This certification was thereafter amended, without objection, by changing the Union's name to United Industrial Workers Local 976, International Union, Allied Industrial Workers of America, AFL-CIO. No issue is presented respecting this change (R. 33; 343-344).

that a majority of the employees at that plant did not desire the Union to represent them; and (4) that the Union, by agreeing to the private election and participating therein, waived its right to represent the employees under the Board's certification. The subsidiary facts pertinent to these asserted defenses and the Board's findings are set forth below.

I. The Board's Findings Of Fact

A. *The Board finds a single two-plant unit appropriate and directs an election*

On March 28, 1956, the Union filed a petition with the Board requesting certification as the bargaining representative in a single unit comprising all of respondent's production and maintenance employees.[4] These included the employees of both the Avalon Boulevard and Regent Street plants of respondent (R. 162-163). Respondent took the position that the employees of each plant should constitute separate

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[4] The petition, which gave respondent's address as "7000 S. Avalon Blvd., Los Angeles," was amended early in the hearing to show the address as also including "6345 Regent St., Huntington Park" (R. 162-163). Prior to the amendment, however, the Union's representative stated that the Union considered the employees of both plants to constitute a single appropriate unit R. 163). At one point during the third day of the hearing, the Union's representative, in order to expedite a determination of the representation question, expressed a willingness to stipulate that the two plants constituted separate appropriate bargaining units, but when advised by the hearing officer that such a stipulation would not necessarily expedite the determination, he elected to proceed on the basis of his claim that a single unit was appropriate (R. 190-199).

bargaining units (R. 163-164). Two unions other than the petitioning union intervened in the representation proceeding and, although willing to accept the unit desired by the petitioning union, took no firm position on the unit issue (R. 191).[5] The facts relevant to the unit issue, as developed at the representation hearing and found by the Board, are set forth below.

Respondent is a corporation engaged in the manufacture and sale of aircraft parts and components and screw machine products (R. 31; 8, 13). Its two plants are located in Los Angeles County about 2½ miles from each other (R. 34, 339; 162-163, 164). The Regent Street plant, the smaller of the two, was acquired about 1954 apparently because additional space was needed for respondent's operations (R. 34, 339; 180). More than 80 percent of the components assembled at the Regent Street plant come from the Avalon Boulevard plant, which is essentially a large machine shop manufacturing metal components (R. 34, 339; 183). A closing of the Regent plant would curtail the operations of the Avalon plant about 50 percent (R. 183).

A single purchasing department is maintained at Avalon (R. 181-182, 183-184), and neither plant is charged for any items it receives from the other (R. 174-175, 182). The accounting department issues a single operating statement for the Company and both

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[5] The intervenors were United Auto, Aircraft, Agricultural Implement Workers of America, UAW-AFL-CIO and International Association of Machinists, AFL-CIO, District No. 94 (R. 160, 161).

plants use the same bank accounts (R. 167-168, 178). The two plants have a "composite" bookkeeping setup maintained at Avalon where a single payroll for both is kept (R. 34, 339; 166, 169, 175, 180, 189). The same payroll account number is used for social security and unemployment insurance purposes (R. 167). Although each plant does its own hiring and employees are not ordinarily interchanged between the two plants, a "uniform" personnel policy is established by respondent's board of directors governing, *inter alia*, vacations, wages, and bonuses (R. 34, 339; 172, 173, 174). The employees of both plants are covered by insurance under a single policy carried by respondent (R. 168). And finally, although the Avalon plant is essentially a machine shop and the Regent plant an assembly operation, both employ certain employees with similar skills, for several of the departments, such as assembly, shipping and receiving, are "the same or similar" (R. 34, 339; 165, 176-178).[6]

On the basis of the foregoing facts, the Board concluded that "because of the centralized administration and functional integration of the two plants, the similar skills of the employees, and the uniform per-

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[6] Whatever differences prevail in the skills of the employees, these were not among "the major differences" cited by respondent's secretary-treasurer, Holtzman; these differences were, at most, only "differences in detail" (R. 164-166). Nor were any such differences among the grounds upon which respondent was "content to rest its case in support of its contention that there should be two separate units established" (R. 199-200).

sonnel policy," a single unit of the production and maintenance employees of both plants was appropriate (R. 34-35, 339). It accordingly directed that an election be held in the two-plant unit (R. 338-341).

B. *The Board denies respondent's motion for rehearing and reconsideration*

The election was scheduled for August 8. On July 24, respondent filed a document with the Board asking the Board (1) for a rehearing and reconsideration of its decision; (2) to suspend the election pending such redetermination; (3) to permit respondent to adduce additional evidence; (4) to vacate the decision and direction of election; and (5) to dismiss the representation petition (R. 35-36; 424-446). In its motion respondent argued that the Board's unit determination was inconsistent with some Board determinations in other cases; that certain testimony bearing on the unit issue was not fully developed by respondent at the hearing because respondent's representatives assumed that the Board would adhere to its past policies and find separate plant units to be appropriate; and that testimony of a more detailed nature would reveal pertinent differences in production and working conditions at the two plants.

On August 2, the Board issued a telegraphic order denying respondent's motion "for the reason that it presents no issues which were not previously considered by the Board" (R. 36; 352-353). Although copies of this order were sent to all parties, respondent failed to receive a copy until August 10. The copy it received at that time recited "Delay due to GSA

error not National Labor Relations Board" (R. 36; 251-252, 449-451).[7] However, respondent admittedly received notice on more than one occasion between August 2 and August 8 that the election would be held on the appointed day, and respondent's secretary-treasurer, Holtzman, conceded that he also "may have" been specifically advised that respondent's motion had been denied (R. 36-37; 326, 329-330, 357).

C. *The election and the Union's certification as bargaining representative*

The election was held on August 8 as scheduled. At the Avalon plant, because of respondent's refusal to permit the use of its premises for the election, polling booths were set up by Board election officials on the sidewalks outside the plant (R. 37; 211, 249, 327-328, 329, 358). Ballots were cast by 230 of the approximately 460 employees at both plants who were eligible to vote. Of the 230 votes cast, 207 were for the Union, 1 was for an intervening union, 20 were against either union and 2 ballots were challenged (R. 37; 350-351). None of the parties at any time filed objections to the conduct of the election,[8] and on

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[7] The reference to "GSA" meant the General Services Administration and its teletype system (R. 36).

[8] Section 102.61 of the Board's Rules, Series 6, then in effect (29 C.F.R. 102.61), renumbered in Series 7 as Section 102.69 (23 F.R. 3268) provides in pertinent part:

> Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of the ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional

August 20 the Union was duly certified as bargaining representative in the unit found appropriate by the Board (R. 38; 207, 248, 342-343).

D. *Respondent's refusal to bargain*

Following a number of telephonic communications between the parties, the Union's secretary-treasurer, Doria, wrote to respondent on September 14, asking that a date be selected to commence negotiations for a contract covering the two plants, and enclosing a proposed form of agreement. The letter also requested respondent to furnish certain wage and other information "in order * * * to properly enable [the union] to bargain" (R. 39-40; 223, 345-347). On September 24 respondent wired the Union that all meetings should be arranged with respondent's "des-

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director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the result of the election, and if no run-off election is to be held pursuant to section 102.62, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

ignated representative, H. Devoe Rea & Associates" (R. 40; 375).

A meeting was held on September 26. Doria represented the Union. Respondent was represented by Rea and Aiken, members of the Rea firm. Rea announced respondent's position to be that the Board election was invalid, that the election did not reflect the desires of the employees, and that the Union had therefore been improperly certified. Rea nevertheless undertook to advise Doria whether respondent would change its mind (R. 41; 213-215, 217, 274-276, 290-291). However, a letter from the Union, dated October 1, requesting a meeting to discuss certain alleged anti-union activities, discrimination and unilateral dealings respecting bargaining matters in both plants went unanswered by respondent (R. 42; 213, 348-349). A telephone conversation thereafter between Doria and Aiken confirmed that respondent had withheld from its representatives authority to bargain in the two-plant unit and wanted to test the Board's certification in the courts (R. 42, 43; 214, 219).

At that time, as admitted by Aiken, "One of the major decisions, probably the major decision was the question of negotiating on the basis of the unit as set forth by the Board's certification or whether we would negotiate on the Regent Street separately" (R. 278). But Aiken and Rea consistently adhered to the position that respondent would not recognize the Union as representative of the employees at the Avalon plant (R. 42; 214-215, 221-222, 255, 290-291, 295).

On November 1, following the filing of the Union's charge with the Board, Aiken wrote to the Board's Regional Office that "the Company's admitted failure and refusal to collectively bargain with said Union" was justified by the invalidity of the Board's certification (R. 43-44; 353-355).

Meanwhile, Rea had failed to respond to a proposal which Doria had sent at Rea's request in the latter part of October in an effort "to get the parties together for the purposes of bargaining" (R. 45-46; 217-218). In this proposal Doria had suggested separate agreements for each plant, provided, however, that neither was to be effective until both were executed. The proposal further stated, "nor shall the division of the two plants for the purpose of establishing the two agreements be construed as a waiver on the part of the Union of the appropriateness of the single collective bargaining unit for the two Deutsch plants involved." (R. 46; 374-375).

In view of respondent's intransigent denial of the Union's representative status at the Avalon plant, Doria proposed late in October that a card check be conducted among the Avalon employees. This was rejected by respondent (R. 44-45; 279, 295-296). Respondent countered with a proposal that a private election be held at the Avalon plant, and notified the Union that it would adhere to its refusal to bargain at Avalon "unless and until a free election by secret ballot is held to determine the wishes of the majority" at that plant. The Union yielded after much protest, but never agreed that the Board's certification was to be affected thereby (R. 46-47, 48; 258-259, 264-

265, 281-282, 297-299, 359, 364-365, 366-368, 370-371).

The agreement for the conduct of the private election, entered into on November 12, set forth in full in the Trial Examiner's intermediate report (R. 51-52), provided that if the Union won, the Company would bargain without further objection to the Board's unit finding; but that if the Union lost, the Union would refrain from any strikes or related pressure [9] and respondent would refrain from any anti-union activity, "until the question of representation is tested and determined by the circuit court of appeals" (R. 52-53; 236-237, 301, 365-367, 375-377. In this connection the Union issued a statement to the employees, informing them (R. 366-367):

> THIS VOTE TO PROVE UNION MAJORITY HAS NOTHING TO DO WITH THE GOVERNMENT VOTE WHERE THE UNION WON ELECTION. THIS VOTE IS NOT A NEW ELECTION
>
> The results of this vote will have nothing to do with the election that was conducted by the Government and which was won by the Union. This vote is only being taken in the hope that the results will make any further action by the Government unnecessary. This vote cannot change the results of the Government election. The Union will still be certified by the Government in both plants regardless of the outcome of this vote. THIS VOTE IS ONLY FOR THE PUR-

[9] During the period when respondent was refusing to bargain pursuant to the certification, the Union had been conducting sporadic strikes at both plants (R. 41; 275-277, 372-373).

POSE OF PROVING THE UNION MAJORITY IN THE AVALON PLANT SO THAT INSTEAD OF GOING THROUGH MONTHS OF GOVERNMENT "RED TAPE," CONTRACT NEGOTIATIONS CAN START IMMEDIATELY IN BOTH PLANTS.

IF UNION WINS VOTE:

1. Bargaining starts immediately in both plants.
2. All Government "red tape" for enforcement will no longer be necessary.
3. From 3 to 18 months of time will be saved.

IF UNION LOSES VOTE IN AVALON PLANT:

1. The Union agrees to wait until the Government enforces the order for the Company to bargain on a contract.
2. The Union still remains certified as the Union in both plants of the Deutsch Company. Nothing will be lost.

The private election at Avalon was held on November 16 and resulted in a vote of 169 to 137 against the Union. In addition, 49 employees who had been challenged were excluded from the ballot by mutual agreement (R. 53-54; 246-247).

The parties met again on December 4, with Doria renewing his request for bargaining at both plants and stating he had relinquished no claim concerning the Union's status at Avalon. Respondent refused to discuss any contract covering the Avalon employees and it was agreed that further negotiation was futile (R. 54; 224-225, 227-229, 264-266, 287, 299-301).

II. The Board's Conclusions Of Law

Upon the foregoing findings, the Board, affirming the Trial Examiner, concluded that respondent had refused to bargain with the Union in violation of Section 8 (a) (5) and (1) of the Act (R. 81, 74, 76). It refused to permit relitigation of the appropriate unit question determined in the representation proceeding (R. 56-57, 59), rejected respondent's contention that the August election was invalid (R. 59-64), held the November election to be without effect "as it was a private election conducted in only one of two plants which the Board had previously found constituted a single appropriate unit and in which the Union was certified" (R. 81, 64-67), and rejected respondent's argument that it had bargained in good faith (R. 68-74).

III. The Board's Order

The Board's order, in the usual form, requires respondent to cease and desist from continuing its unfair labor practices or violating the employees' rights "in any like or related manner." (R. 81-82). It affirmatively directs respondent, upon request, to bargain with the Union in accordance with the Board's certification, and to post appropriate notices (R. 82-85).[10]

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[10] On September 30, 1957, respondent filed with the Board a motion for rehearing and reconsideration of the Board's decision and order, alleging, in addition to matters already presented to the Board, that respondent was faced with conflicting claims by persons purporting to represent the Union and suggesting that the Union certified by the Board

SUMMARY OF ARGUMENT

The record amply supports the Board's finding that respondent refused to bargain with the certified Union in the appropriate unit as determined by the Board. Indeed, the facts constituting such refusal were admitted by respondent. Since the unit determination was proper under the Board's wide discretion, and since the election conducted by the Board in such unit in August was valid and respondent, in any event, waived any right to object to any matters affecting the results of the election by its failure to file timely objections, respondent's refusal to bargain violated Section 8 (a) (5) of the Act, as the Board concluded.

The subsequent election in November had no effect upon the Union's representative status pursuant to the certification. The Union could not lawfully have agreed to represent only part of the employees in the certified unit and it did not purport to make such an agreement.

Respondent's attempt to reopen the representation question in the complaint proceeding was not based on newly discovered evidence, or on evidence unavailable in the representation proceeding, and the Board

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might no longer be in existence; respondent, however, did not indicate any willingness to bargain with the certified union or its accredited representatives if ascertained (R. 86-101). The Union, on October 2, 1957, filed an opposition to respondent's motion (R. 101-103). Upon consideration of the matter, the Board, on November 7, 1957, denied respondent's motion "on the ground that insufficient cause has been shown to warrant changing" its prior decisions and orders (R. 103-104).

properly refused to allow relitigation of the matter. Moreover, respondent's request to the Board, following its receipt of the Board's decision and order, for leave to adduce additional evidence was properly denied; and respondent's similar request to this Court should be denied. With respect to the unit issue, respondent alleged no material newly discovered or previously unavailable evidence. And if by reason of any internal union dissension subsequent to the Board's order, any question should arise as to the identity of the certified union or its accredited representatives at a time when respondent is ready to honor a request to bargain pursuant to the Board's order, such question may then be determined by the Board or other appropriate forum.

ARGUMENT

I. The Board Properly Found That Respondent Refused To Bargain With the Certified Union In The Unit Found Appropriate By The Board

Section 8 (a) (5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9 (a), in turn, provides that representatives selected for the purposes of collective bargaining "by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." And Section 9 (b) declares that "The Board

shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

The facts detailed *supra* (pp. 8-12) amply support the Board's finding that respondent refused to bargain collectively with the representatives of its employees certified by the Board in "the unit appropriate for the purposes of collective bargaining" as determined by the Board. The bargaining unit found appropriate was the employer unit consisting of both the Avalon and Regent plants. This was the unit covered by the Union's bargaining request which it addressed to respondent on September 14 following the Board's certification of the Union as the bargaining representative for employees in that unit. From the outset, respondent took the firm position, to which it consistently adhered thereafter, that it would not bargain for the Avalon plant because the Union did not represent a majority of the employees in that plant and that the Board had erred in finding that the two plants constituted a single appropriate unit. Indeed, "the Company's admitted failure and refusal to collectively bargain with said Union" was acknowledged by respondent in its letter to the Board that followed the filing of the charge herein (R. 354). And on November 9, in a communication addressed to all its employees, it admitted its "position" to be "that before we would enter into negotiations with this union for the employees at the Avalon plant, they

would first have to prove in a free election, and by secret ballot, that they do, in fact, represent the majority of you people" (R. 364, 359).

Respondent nevertheless contends that it bargained in good faith with the Union because, following the Board's certification, it negotiated with the Union with respect to a determination of the majority status of the Union at the Avalon plant and entered into an agreement with the Union for a privately conducted employee election at that plant (R. 147-148, 150). This position is plainly untenable. The Union's status as the bargaining representative of employees in the employer unit, which the Board had determined pursuant to Section 9(c) of the Act, was not a bargaining matter. "This status is acquired by statute and is not within the area of collective bargaining" even though the employer acts "in good faith." *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 236 F. 2d 898, 904 (C.A. 6) affirmed, 356 U.S. 342, 349, 350; *McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 116 F. 2d 748, 751, 752 (C.A. 7), certiorari denied, 313 U.S. 565. As the Supreme Court recently held, it is "unlawful to insist upon matters" outside "the scope of mandatory bargaining." *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349. Such an insistence, "against the permissible opposition of the [Union], amounted to a refusal to bargain as to the mandatory subjects of collective bargaining" (*id.* at 348).

Also in point here is *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278 (C.A. 2),

wherein the union insisted, over the employer's objection, on bargaining with respect to a different unit of employees from the one certified by the Board as appropriate. Holding that the union's insistence was violative of its bargaining obligation under the Act, the Court stated, in language which precisely fits respondent's action here (241 F. 2d at 282, 283):

> This distinction between private bargaining over conditions of employment and administrative determination of the unit appropriate for bargaining is clear. The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9 (c) of the Act, and its decision is conclusive on the parties, cf. Brown, for and on behalf of N.L.R.B. v. Pacific Tel. & Tel. Co., 9 Cir., 218 F. 2d 542, 544, although the decision may subsequently be changed.
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> * * * *
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> The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining "with respect to rates of pay, wages, hours and conditions of employment" in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3).

And compare this Court's holding in *N.L.R.B.* v. *Retail Clerks International Ass'n*, 203 F. 2d 165, 169-170, that unions may not "condition their *duty* to bargain collectively for the bargaining unit which they represent, as to 'wages, hours, and other terms and conditions of employment' upon the employer's bargaining with a class of employees *outside* the unit."

Plainly, therefore, the Board was correct in holding that respondent refused to bargain with the Union. Whether this refusal was lawful depends on the validity of respondent's other asserted defenses, to which we now turn.

II. The Board's Determination Of The Appropriate Bargaining Unit Was Proper

Respondent's chief contention in the representation and unfair labor practice proceedings has been that the Board erred in finding the employer unit, rather than the plant units, appropriate. As we show below, the Board's determination of the unit issue was reasonable and is therefore binding on the parties.

Section 9 (b) of the Act commits to the Board the authority to determine in each case whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In exercising this authority, the Board's discretion is very broad. As this Court stated in *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405, certiorari denied, 348 U.S. 887:

The Board's Determination Of The Appropriateness Of A Unit Will Not Be Set Aside Unless It Is "Arbitrary Or Capricious".

Great latitude is given to the Board in determining "the unit appropriate for the purposes of collective bargaining."

In Packard Motor Car Company v. National Labor Relations Board, 1947, 330 U.S. 485, 491, 67 S. Ct. 789, 793, 91 L. Ed. 940, the Court used the following language:

> "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board if not final, is rarely to be disturbed."

The Board's determination in this case that the employer unit was appropriate was not "arbitrary or capricious." The evidence summarized in the Statement, *supra*, pp. 4-5, consisting almost entirely of the testimony of respondent's secretary-treasurer, furnishes ample basis for the Board's finding that the appropriate bargaining unit here was a single employer unit. Respondent's two plants are only about 2½ miles apart. They are functionally integrated as indicated by the fact that more than 80 percent of the parts used at the Regent plant come from the Avalon plant and a shutdown of the Regent plant would curtail the operations of the Avalon plant by about 50 percent. The two plants, moreover, are centrally administered. They have a composite bookkeeping set-up maintained at Avalon; a single payroll is kept for both plants; a single purchasing department is maintained at Avalon and neither plant is

charged for any items it receives from the other; the accounting department issues a single operating statement for the Company; and both plants use the same bank accounts. Several of the departments at each of the plants, such as assembly, shipping and receiving, are the same or similar and employ persons of similar skills. And finally, a uniform personnel policy is established by respondent's board of directors.

It was "because of the centralized administration and functional integration of the two plants, the similar skills of the employees, and the uniform personnel policy" thus established by the foregoing facts that the Board found the single employer unit to be appropriate here (R. 34-35). Far from being arbitrary or capricious, this determination was eminently reasonable.

The Board observed that certain factors (such as the physical separation of the plants, the separate sales offices, the fact that each plant does its own hiring, and the lack of interchange of employees between the plants) could have justified separate plant units, as urged by respondent. However, it did not deem these factors to be of sufficient weight to overbalance the considerations militating for a single employer unit. In so holding, the Board did not embark on an uncharted sea. No two cases are quite alike in this field. But within the bounds that the numerous factors entering into a unit determination and the flexibility of each permit precedent to be a guide, the instant determination finds ample support in prior Board and court decisions.[11]

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[11] See, for example: *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 164-165; *Foreman & Clark, Inc.* v. *N.L.R.B.*,

It is precisely in circumstances like these, where more than one unit determination could appropriately be made, that the "large measure of informed discretion" lodged in the Board (*supra*, p. 20) becomes most meaningful. The exercise of this discretion is most needed when, as here, the various conflicting factors are so balanced that the determination turns on the nicest distinctions. Accordingly, in just such a situation, "the decision of the Board if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 491; *N.L.R.B.* v. *Smith Co.*, 209 F. 2d 905, 907 (C.A. 9).

III. The Board Properly Rejected Respondent's Contention That The Election Conducted At Its Avalon Plant Was Invalid

Although in the representation proceeding respondent filed no objections to the election, as provided by the Board's rules and regulations, it later contended in the unfair labor practice proceeding that the election was invalid because of alleged irregularities in the conduct of the election at the Avalon plant. It asserted that because it had not received notice of the Board's denial of its petition for reconsideration of the Board's decision and direction of election at the time the election was conducted, it refused to co-

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215 F. 2d 396, 398-399 (C.A. 9), certiorari denied, 348 U.S. 887; *N.L.R.B.* v. *Williams*, 195 F. 2d 669, 670-672 (C.A. 4), certiorari denied, 344 U.S. 834; *N.L.R.B.* v. *A. K. Allen Co.*, 252 F. 2d 37, 38-39 (C.A. 2); *North Memphis Lumber Company*, 81 NLRB 745; *Pine Hall Brick and Pipe Company*, 93 NLRB 362; *Coburn d/b/a Coburn Catering Corporation, et al.*, 100 NLRB 1133. See also, *Riegel Paper Corporation*, 96 NLRB 779.

operate with Board election officials at its Avalon plant by furnishing a list of its employees or permitting its premises to be used in connection with the balloting. Respondent alleged that, as a result, the Board representatives set up polling booths on the sidewalk outside the plant, that employees desiring to vote had to stand in line and execute affidavits as to their employee status before voting,[12] and that because of this inconvenience and the reluctance of some of the employees to miss time from their work to vote, only about 40 percent of the employees at that plant voted. Respondent's belated contentions based on these alleged facts (set forth in an offer of proof (R. 248-249)) were properly rejected by the Board.

In the first place, respondent, having failed to file any objections to the election within five days after being furnished with a tally of the ballots, as provided by the Board's rules and regulations,[13] was precluded in the unfair labor practice proceeding from urging any defense to its refusal to bargain based upon the conduct of the election or conduct affecting the results of the election. Here, as in *N.L.R.B.* v. *National Mineral Co.*, 134 F. 2d 424, 426 (C.A. 7), certiorari denied, 320 U.S. 753, "the employees have not protested at all, and the employer has raised the

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[12] Cf. *N.L.R.B.* v. *National Mineral Co.*, 134 F. 2d 424, 428 (C.A. 7), certiorari denied, 320 U.S. 753, where, because of the employer's refusal to cooperate, a similar procedure was employed by the Board.

[13] See Section 102.61 of the Rules and Regulations, Series 6 (29 C.F.R. 102.61), then in effect, renumbered Section 102.69 in Series 7 (23 F.R. 3268), now in effect (*supra*, p. 7, n. 8).

question belatedly." This failure to file timely objections constitutes a "fatal defect in respondent's case." *N.L.R.B.* v. *Conlon Bros. Mfg. Co.*, 187 F. 2d 329, 332-333 (C.A. 7). See also *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 161-162.

Aside, however, from the untimeliness of respondent's objections, they are, in any event, without merit. Respondent had no legal right to a ruling on its petition for reconsideration of the Board's decision and direction of election. The Board's rules establish a comprehensive procedure governing the processing of representation cases (29 C.F.R. 102.52-102.62, now 29 C.F.R. 102.60-102.70 (23 F.R. 3266-3269)), but nowhere in this procedure is there a provision for motions or petitions for reconsideration. That the Board, as a matter of courtesy, may pass upon such petitions when they are filed certainly creates no right to such a ruling. But even if it should be assumed that respondent had a right to a ruling on its petition, it would stand in no better position than any party who refuses to proceed further in a proceeding because of alleged interlocutory error. Such a party may not condition his further participation upon the tribunal's reconsideration of the alleged error in advance of the conclusion of the proceeding. Much less may the party prevent the tribunal from proceeding until he receives formal notice of the ruling upon reconsideration. Cf. *The Borden Company*, 108 NLRB 807, 812, affirmed, 227 F. 2d 166 (C.A. 5). Here, as we have shown (*supra*, pp. 6-7), not only did the Board actually rule upon the motion well before the election, but respondent was on notice that the

election would be held as scheduled and, indeed, admittedly "may have" been informally advised of the denial of the motion. In these circumstances, respondent is hardly in a position to assert either a deprivation of rights or that the election was inconclusive. Cf. *N.L.R.B.* v. *S. H. Kress & Co.*, 194 F. 2d 444, 445-446 (C.A. 6).

Respondent apparently contends that the election was invalid because, as a result of respondent's refusal to cooperate, less than a majority of the eligible employees voted in the election at its Avalon plant. It is well settled, however, that participation by a majority in the election is not a prerequisite to a valid election, for "voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who vote." *N.L.R.B.* v. *Whittier Mills Co.*, 111 F. 2d 474, 477 (C.A. 5). As stated by the Supreme Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560, in construing representation provisions of the Railway Labor Act similar to those of the National Labor Relations Act, "Election laws providing for approval of a proposal by a specified majority of the electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election." This ruling has been uniformly followed by the courts and the Board. *N.L.R.B.* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852, 853 (C.A. D.C.), certiorari denied, 324 U.S. 847, and cases cited therein; *N.L.R.B.* v. *Standard Lime and Stone Co.*, 149 F. 2d 435, 436-437 (C.A. 4), certiorari denied, 326 U.S. 723.

Moreover, respondent, having brought about the very conditions which it now contends detracted from the validity of the election, is in a particularly inappropriate position to complain. Respondent asserted before the Board, however, that in insisting upon a determination of its motion for reconsideration as a condition to participating in the election, it was "not asking for this for itself, but for the people who work at the Avalon plant" (R. 249-250). "In effect, [respondent] seeks to vindicate the rights of [its] employees to select their bargaining representative. * * * The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103. See also *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 406, 408 (C.A. 9), certiorari denied, 348 U.S. 887; *N.L.R.B.* v. *National Mineral Co.*, 134 F. 2d 424, 426-427 (C.A. 7), certiorari denied, 320 U.S. 753.

IV. The Board Properly Regarded The Results Of The Private Election At The Avalon Plant, Following Respondent's Refusal To Bargain Pursuant To The Board's Certification, As Immaterial To Any Issue In This Case

We have established above that respondent refused to bargain with the Union duly certified by the Board following a valid election in the appropriate bargaining unit. This, of course, constitutes the violation of Section 8 (a) (5) found by the Board. Respondent contends, however, that the private election held at

the Avalon plant in November, less than three months after the certification, showed that the Union was not the majority representative of the Avalon employees and, that by agreeing to such election, the Union waived all rights under the August certification. These contentions are wholly without substance, for the November election lacked legal effect.

Aside from the fact that respondent's prior refusal to bargain with the Union in the certified unit might well have affected the results of any election conducted thereafter, the results of the private election, as the Board held, were immaterial in any event, but particularly in view of the fact that that election was not in the unit which the Board had found to be appropriate and in which the Union was certified (R. 81). As we have already shown, the Board only a few months earlier had properly found the employer unit consisting of employees of both respondent's plants, rather than two separate plant units, to be appropriate for collective bargaining in this case. Respondent, in the absence of unusual circumstances not present here, was legally obliged to bargain with the Union as the representative of employees in this unit for a reasonable period, normally at least a year following the certification. *Brooks* v. *N.L.R.B.*, 348 U.S. 96; *Carpinteria Lemon Assn.* v. *N.L.R.B.*, 240 F. 2d 554, 557 (C.A. 9), certiorari denied, 354 U.S. 909.

The Union, moreover, did not purport to waive its status as the certified representative, nor could it lawfully have agreed to represent only part of the employees in the bargaining unit. As shown in the Statement, *supra*, pp. 10-12, the Union made it plain to

respondent and to the employees that it was agreeing to the private election only in the hope that, if it won, respondent would bargain in the certified unit without further delay. At the same time the Union made clear its contention that if it lost, it would be in no worse position than it was already in—that is, it would have to await a Board order and the court's enforcement of that order in the pending unfair labor practice case before respondent would obey its bargaining obligation. In point here is *McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 116 F. 2d 748, 751-752 (C.A. 7), certiorari denied, 313 U.S. 565, wherein the union, while pressing an unfair labor practice charge based on the employer's refusal to grant it recognition as the exclusive bargaining representative, signed an agreement in which the employer accorded it recognition for its members only. In that case, the court, rejecting a contention that the union by signing the agreement had rendered moot any issue as to the employer's refusal to grant it recognition as the employees' exclusive bargaining representative, stated:

> * * * the Union, after engaging in a controversy * * * regarding its right to complete recognition, consented to accept the most it could obtain of a right to which it was entitled for the asking. A consent given under such circumstances cannot be utilized by [respondent] to relieve it of its statutory duty to grant complete recognition. In this connection, it seems pertinent to point out that when the Union was denied recognition in defiance of the statutory mandate, it placed its reliance upon the Board to require

> [respondent] to concede that about which there was no room for controversy. That the Union pursued this lawful and peaceful method is to its credit.[14]

As the statutory representative of the employees in the employer unit, the Union was legally required to represent all of them. *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192. The "right" of "[e]mployees * * * to bargain collectively through representatives of their own choosing" (Section 7 of the Act) is one which the Union could not have waived even if it had so desired. Particularly is the Union's capacity to waive its bargaining status lacking in view of the overriding public interest in Board proceedings. Indeed, the paramount character of this public interest is such that it has long been settled law that, notwithstanding the literal language of Section 7 above quoted, the rights created by the Act are public, not private. *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 362, 364; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265, 268-269; *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 543; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 192-193, 197; Pope, J., concurring in *Brown* v. *Pacific Telephone and Telegraph Company*, 218 F. 2d 542, 544 (C.A. 9); cf. *Nathan-*

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[14] And cf. *N.L.R.B.* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 948-949 (C.A. 2), in which the court rejected the employer's contention that it had not violated Section 8 (a) (5) of the Act by refusing, during the course of bargaining, to furnish requested wage data because the union had thereafter signed a contract without receiving the requested information.

son v. *N.L.R.B.*, 344 U.S. 25, 27. And, as this Court early recognized, in harmony with uniform authority, only the Board has the power to compromise obligations arising under the Act, and settlements between the parties themselves are not binding upon the Board. *N.L.R.B.* v. *American Potash & Chemical Corp.*, 113 F. 2d 232, 234-235.[15] Cf. *N.L.R.B.* v. *Sunshine Mining Co.*, 125 F. 2d 757, 760-761 (C.A. 9).

V. There Is No Merit To Respondent's Request For Leave To Adduce Additional Evidence

In its "Petition to Modify and Set Aside Orders of the National Labor Relations Board," respondent asks this Court to permit it to adduce additional evidence with respect to (1) the propriety of the Board's "selection of the unit" and (2) "the present existence of the alleged Union" (R. 124-125). Respondent had made a similar request to the Board on September 30, 1957, shortly after the Board issued its decision and order (*supra*, p. 13, n. 10). The Board properly denied the request.

With respect to the unit issue, respondent has failed to allege any material evidence which was either

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[15] Accord, *Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248, 253-255; *N.L.R.B.* v. *Local 404, International Brotherhood of Teamsters, etc.*, 205 F. 2d 99, 103 (C.A. 1); *N.L.R.B.* v. *General Motors Corp.*, 116 F. 2d 306, 312 (C.A. 7); *N.L.R.B.* v. *Prettyman*, 117 F. 2d 786, 792 (C.A. 6); *Waterman S.S. Corp.* v. *N.L.R.B.*, 119 F. 2d 760, 762 (C.A. 5); *N.L.R.B.* v. *Bird Machine Co.*, 174 F. 2d 404, 407 (C.A. 1); *N.L.R.B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *N.L.R.B.* v. *Hekman Furniture Co.*, 207 F. 2d 561 (C.A. 6); *N.L.R.B.* v. *Robinson*, 251 F.2d 639, 642 (C.A. 6).

newly discovered or unavailable in the representation proceeding. It is settled, of course, that in the absence of such newly discovered or previously unavailable material evidence, "an issue covered and decided in unit proceedings cannot as of right be relitigated in a subsequent unfair labor practice proceeding" (*N.L.R.B.* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C.A. 1), certiorari denied, 336 U.S. 903), for "a single trial of the issue [is] enough." *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162. Accord, *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 162 F. 2d 435, 440-441 (C.A. 7); *N.L.R.B.* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 201 (C.A. 6), certiorari denied, 328 U.S. 866). The Trial Examiner in the unfair labor practice case expressed his willingness to permit a showing of "any change in the nature of the operation of the business" since the Board election, but respondent admitted there had been none (R. 308-309). The Examiner also indicated that he would allow a showing of a change in "job classifications," but respondent admitted that the employees were "doing the [same] work" (R. 308-309, 318-319).[16] The Examiner further indicated he would receive evidence of "any drastic expansion or reduction in personnel since the election," but none was offered (R. 308-309). In fact, respondent's counsel admitted that the evidence he was offering "as to the alleged

[16] Respondent's contention here was simply that it had never identified the various job classifications until after the representation proceeding (R. 319). Obviously, however, the evidence was available to respondent at all times, and no explanation was offered for respondent's failure to adduce it at the earlier hearing.

differences between the two plants, is the situation that existed at the time of the original Board representation hearing" (R. 318-319). In these circumstances, the Board properly upheld the Trial Examiner's refusal to receive additional evidence on the unit issue and also properly denied respondent's request, in its petition for reconsideration, for the receipt of such additional evidence (R. 56-57, 59, 104).

The only evidence which respondent now alleges to be "newly discovered" consists of that relating to the November private election at the Avalon plant. This evidence was, however, received. And, as we have already shown, the Board correctly treated it as immaterial to any issue in this case.

The Board was also clearly warranted in rejecting respondent's request for leave to adduce evidence relative to internal differences within the Union purportedly occurring subsequent to the Board's order and bearing on what respondent termed "the present existence of the alleged Union" (*supra*, p. 13, n. 10). The Board's order requires respondent to bargain with the Union only "upon request" and if, when respondent is ready to bargain pursuant to such a request, any question such as that now raised by respondent should exist, the question may at that time be determined by the Board or other appropriate forum. Cf. *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100, 105-106. Enforcement of the Board's order results in no ambiguity for respondent, nor does it require respondent to bargain with any union other than that certified by the Board. No dissolution or schism or change of affiliation is or can be suggested. The only possible problem respondent

might encounter would be to ascertain the identity of the authorized agents of the certified union. And this is a problem which any employer might have to face under any bargaining order. For these reasons a case like *Dickey* v. *N.L.R.B.*, 217 F. 2d 652 (C.A. 6), cited by respondent, which concerns *a change in the identity of the union prior to the order to bargain*, is wholly inapplicable. Cf. *Carpinteria Lemon Ass'n* v. *N.L.R.B.*, 240 F. 2d 554, 556-557 (C.A. 9); *N.L.R.B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 888 (C.A. 2), certiorari denied, 342 U.S. 871; *Continental Oil Co.* v. *N.L.R.B.*, 113 F. 2d 473, 477-478 (C.A. 10). Respondent's contention has "as little substance" and is as much "a smoke screen" as the contention made in *N.L.R.B.* v. *Harris-Woodson Co.*, 179 F. 2d 720, 723 (C.A. 4), wherein the local union, after being certified, changed its affiliation.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Board's order should be enforced in full.

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July 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times

and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be

represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a);

* * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and

thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, where-

in the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States

Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

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